

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs November 29, 2007

**IN RE B.B.**

**Appeal from the Juvenile Court for Montgomery County  
No. 119-162 John J. Hestle, Judge**

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**No. M2007-00805-COA-R3-JV - Filed March 24, 2008**

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Mother appeals the trial court's modification of a permanent parenting plan, ordered in the absence of any testimony or evidence, for the parties' non-marital child. We vacate the order of the juvenile court and remand for further proceedings to determine the best interest of the child.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court is Vacated and Remanded**

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Dennis W. Stanford, Clarksville, Tennessee, for the appellant, Tammy L. Brown.

Sharon T. Massey, Clarksville, Tennessee, for the appellee, Bronson S. Burns.

**OPINION**

**I. FACTUAL BACKGROUND**

Bronson S. Burns ("Father") and Tammy L. Brown ("Mother") are the parents of son B.B., born on March 3, 2004.<sup>1</sup> Within one month of B.B.'s birth, Father filed a Petition to Establish Parentage, DNA Test, Child Custody and Support. The Montgomery County Juvenile Court signed a Parentage Order establishing Father's paternity on June 1, 2004. The Court approved Father and Mother's "Agreed Shared Parenting Plan" on June 30, 2004. The initial parenting plan designated Mother as the primary residential parent and established Father's residential parenting schedule and child support obligations.

Father is, and was at all times relevant to this action, an active member of the United States military. At the time of B.B.'s birth, Mother and Father both resided in Clarksville, Tennessee.

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<sup>1</sup>Father and Mother have never married.

Father later served overseas and was transferred to a military base out of state. Mother and her family continue to reside in Clarksville.

On May 5, 2006, nearly two years after the parties' agreed parenting plan went into effect, Mother filed a petition to modify the parenting plan and alleged that Father was in contempt of court for failing to abide by the plan. In her petition, Mother alleged that Father did not consistently exercise his parenting time with B.B., refused to allow her contact with B.B. while in his care, refused to provide her an itinerary of his travel and activities with B.B., and was consistently unreasonable and uncooperative in making joint decisions regarding B.B. as expressly agreed in the parenting plan. Mother contended that this conduct coupled with an alleged decrease in her monthly income and increase in Father's monthly income constituted "a substantial and material change in circumstances necessitating a change in the Parenting Plan."

Father filed an answer and counter-petition on June 16, 2006. Father stated that he had been stationed in Iraq for the previous ten months. Father alleged that, upon his return from overseas, Mother refused to allow him visitation with B.B. for any extended period of time and refused to provide B.B.'s social security number to allow Father to claim B.B. as a dependent on his tax returns as agreed in the parenting plan.<sup>2</sup> Father stated that the parenting plan was no longer workable because, as he was currently stationed in South Carolina,<sup>3</sup> the distance made every other weekend visitation difficult. Father contended that his relocation and Mother's failure to provide residential parenting time constituted a material and significant change of circumstances warranting a modification of the parenting plan.

After a hearing on November 9, 2006, the court entered a temporary order giving Father approximately fifteen continuous days with B.B. after finding that Father "should have specific residential time with the child pending the final hearing" on the petitions to modify. No transcript of this proceeding appears in the record. The final hearing was held on December 1, 2006, at which time the juvenile court heard only from counsel; no witnesses testified and no evidence was presented by either party. The court later found that the Father was entitled to specific residential time with B.B. and ordered Christmas visitation from December 26, 2006 to January 7, 2007 but again reserved a final decision regarding the permanent plan for a later date. In an order dated December 28, 2006, the court adopted a modified parenting plan "[a]fter considering the proposals filed by the parties as well as the statement and arguments of counsel[.]" The court made no findings of fact, nor did it make any express conclusions of law.

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<sup>2</sup>The parenting plan provided that Mother would claim B.B. as a dependent and receive the accompanying tax deduction every other year beginning in 2004; Father would receive the deduction in alternating years beginning in 2005.

<sup>3</sup>Father's petition contains contradictory statements as to his residence at the time the petition was filed on June 16, 2006, first stating residency was at Ft. Stewart in Georgia and later stating residency was at Ft. Jackson in South Carolina. In his prayer for relief, Father requested the court to modify the visitation order to allow him to exercise his visitation with B.B. in Georgia at least one week per month and to order Mother to provide B.B.'s social security number for tax purposes. Father was stationed in South Carolina at the time of the final hearing on December 1, 2006.

The court's modified parenting plan granted each parent alternating two-week intervals with B.B., thus evenly allocating the number of days each parent would spend with the child. Mother remained the primary residential parent. Once B.B. begins kindergarten, Father will have "residential time with the child on any long or holiday weekend at least one weekend per month." The plan provides a visitation schedule for fall, winter, spring, and summer vacations. The parties were ordered to meet halfway between Columbia, South Carolina, and Clarksville, Tennessee, to exchange B.B., with each parent being responsible for his/her own transportation costs. Provisions regarding child support,<sup>4</sup> tax exemptions, joint decision making, and other details remained largely the same as the initial parenting plan entered in 2004 and are not matters raised on appeal.

Mother appeals<sup>5</sup> seeking review of the Juvenile Court's child custody decisions and claiming it erred in failing to hear any testimony or review any evidence when modifying the parties' parenting plan, instead relying on past experiences in custody and visitation cases. Specifically, Mother claims the court violated Tenn. Code Ann. § 36-6-106 by not considering factors relevant to developing a plan that is in B.B.'s best interest. Father argues that Mother's failure to make an offer of proof or a timely objection at the December 1, 2006, hearing did not preserve the issue for appeal.

## II. STANDARD OF REVIEW

Our review of a trial court's findings on issues of fact in custody and visitation decisions is *de novo* upon the record accompanied by a presumption of correctness unless the evidence preponderates otherwise. *Marlow v. Parkinson*, 236 S.W.3d 744, 748 (Tenn. Ct. App. 2007); *Kendrick v. Shoemaker*, 90 S.W.3d 566, 570 (Tenn. 2002); Tenn. R. App. P. 13(d). We review conclusions of law *de novo* according them no presumption of correctness. *Kaplan v. Bugalla*, 188 S.W.3d 632, 635 (Tenn. 2006). In matters of child custody, visitation and related issues, trial courts are given broad discretion; as such, appellate courts are reluctant to second-guess a trial court's determinations regarding these important domestic matters. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999); *Hoalcraft v. Smithson*, 19 S.W.3d 822, 827 (Tenn. Ct. App. 1999). When the trial court makes no specific findings of fact, however, we must review the record to determine where the preponderance of the evidence lies. *Kendrick*, 90 S.W.3d at 570.

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<sup>4</sup>Father initially paid \$352 per month in child support which was reduced to \$323 per month by the modification. No evidence regarding the parties' respective income was presented even though Mother alleged a disparity and change of income in her petition for modification.

<sup>5</sup>Mother initially appealed the Juvenile Court's order to the Circuit Court for Montgomery County on January 5, 2007. Father moved to dismiss Mother's appeal on the basis that the circuit court did not have appellate jurisdiction over final orders involving child custody. Upon Mother's motion, the appeal was properly transferred to this Court.

### III. ANALYSIS

A child custody or visitation order may be modified when the petitioner proves by a preponderance of the evidence that a substantial and material change in circumstance has occurred such that a change to the custody or visitation order would be in the best interest of the child. Tenn. Code Ann. § 36-6-101(a)(2)(B)-(C). Parenting arrangements for non-marital children must be established and modified using the same standards used in divorce cases. *See* Tenn. Code Ann. § 36-2-311(a)(9). The court uses a two-part test to determine whether a change of custody or visitation is warranted. The threshold issue in every case involving the modification of an existing parenting plan is whether a material change of circumstances has occurred since the plan went into effect. *Marlow*, 236 S.W.3d at 749 (citing *Kendrick*, 90 S.W.3d at 570).

The General Assembly has addressed what may constitute a material change in circumstances in cases seeking modification of an existing parenting plan:

A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance for purposes of modification of a residential parenting schedule may include, but is not limited to, significant changes in the needs of the child over time, which may include changes relating to age; significant changes in the parent's living or working condition that significantly affect parenting; failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of the child.

Tenn. Code Ann. § 36-6-101(a)(2)(C). The Tennessee Supreme Court has stated that there are no "bright-line" rules for determining if and when a material change in circumstances has occurred; however, "there are several relevant considerations: (1) whether a change has occurred after the entry of the order sought to be modified; (2) whether a change was not known or reasonably anticipated when the order was entered; and (3) whether a change is one that affects the child's well-being in a meaningful way." *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003) (citing *Kendrick*, 90 S.W.3d at 570). Specifically, "a parent's change in circumstances may be a material change in circumstances for the purposes of modifying custody if such a change affects the child's well-being." *Kendrick*, 90 S.W.3d at 570.

Once the court determines that a material change of circumstances has occurred, the court must next determine whether a modification of the plan is in the best interest of the child. *Id.*; Tenn. Code Ann. § 36-6-106. To assess what arrangement is in the child's best interest, the court shall consider all relevant factors which include the following, where applicable:

- (1) The love, affection and emotional ties existing between the parents or caregivers and the child;
- (2) The disposition of the parents or caregivers to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent or caregiver has been the primary caregiver;
- (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; provided, that, where there is a

finding, under subdivision (a)(8), of child abuse, as defined in § 39-15-401 or § 39-15-402, or child sexual abuse, as defined in § 37-1-602, by one (1) parent, and that a nonperpetrating parent or caregiver has relocated in order to flee the perpetrating parent, that the relocation shall not weigh against an award of custody;

(4) The stability of the family unit of the parents or caregivers;

(5) The mental and physical health of the parents or caregivers;

(6) The home, school and community record of the child;

(7)(A) The reasonable preference of the child, if twelve (12) years of age or older;

(B) The court may hear the preference of a younger child on request. The preferences of older children should normally be given greater weight than those of younger children;

(8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; provided, that, where there are allegations that one (1) parent has committed child abuse, as defined in § 39-15-401 or § 39-15-402, or child sexual abuse, as defined in § 37-1-602, against a family member, the court shall consider all evidence relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written finding of all evidence, and all findings of facts connected to the evidence. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings;

(9) The character and behavior of any other person who resides in or frequents the home of a parent or caregiver and the person's interactions with the child; and

(10) Each parent or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child.

Tenn. Code Ann. § 36-6-106(a)(1)-(10). The language of Section 36-6-106(a) is not permissive; trial courts are required to consider all factors bearing on the child's best interest.

In the instant case, both parties petitioned for a modification of the parenting schedule and each alleged a material change in circumstances had occurred. In his brief, Father concedes that because both parties requested a change to the parenting plan, the court found there had been a material change of circumstances. The entry of a modified plan evidences the court's agreement that a substantial and material change in the parties' circumstances indeed existed since entry of the initial plan. Upon a finding of changed circumstances, the court must consider whether modification was in the best interest of B.B.

The record before us contains a transcript of the audio recording of the December 1, 2006, hearing.<sup>6</sup> At the hearing, counsel for Mother inquired whether the court would hear proof regarding “the sorts of problems we’ve had.” The judge replied that “[t]hose problems are over, kaput[ ]” and insisted that the parties “start from December 1, 2006, and anything that happens after this if I find somebody violated my order, then they are going to go [to] jail if I find out it’s willful.” No witnesses testified, no affidavits were presented or attached to the parties’ petitions, and no evidence was taken.

The Tennessee Rules of Evidence state that a ruling which excludes evidence is erroneous when it affects a substantial right of the party and “the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.” Tenn. R. Evid. 103(a)(2). It is well-settled that parents have a constitutionally-protected, fundamental right to the care, custody, and control of their children. *See Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). One can hardly argue that the order of a parenting plan, which governs child custody and visitation, does not affect the substantial rights of a child’s parent. It is undisputed that Mother did not make an offer of proof to demonstrate what her testimony or evidence would have been had the trial court permitted her to present evidence. The purpose of Rule 103(a) is to facilitate review of a decision to exclude evidence by preserving the substance of that evidence in the record. *Gillum v. McDonald*, No. M2003-00265-COA-R3-CV, 2004 WL 1950730, \*5 (Tenn. Ct. App. Sept. 2, 2004) (quoting Neil P. Cohen et al., *Tennessee Law of Evidence* § 1.03 [5][a] and [c])). However, an offer of proof is not needed when the substance of the evidence and its reason for admission are apparent from the context. *Id.*; Tenn. R. Evid. 103(a)(2).

Mother was prepared to offer “proof to the sorts of problems” the parties’ have had. The trial court refused to hear that proof. At that time, Mother should have made an offer of proof, but because the court declined to hear any proof on any matter related to the parents’ circumstances or the child’s interests, her failure to do so is not fatal to her appeal. Trial courts must be able to exercise broad discretion when fashioning parenting plans, but they still must base their decisions on the proof and upon the proper application of the applicable principles of law. *Shofner v. Shofner*, 181 S.W.3d 703, 716 (Tenn. Ct. App. 2004); *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996). We recognize that the trial court is not required to list and discuss every enumerated statutory factor it considered in determining the best interest of a child in modification proceedings; however, it must still consider these factors and conduct a best interest analysis in accordance with Tenn. Code Ann. § 36-6-106. *See Keisling v. Keisling*, 196 S.W.3d 703, 723 (Tenn. Ct. App. 2005). Counsel for Mother and for Father made but a few statements about the case history and their clients’ current employment status and child care arrangements before the court said it would set the parenting schedule. Generally, argument of counsel alone is not considered evidence. *Truktax, Inc.*

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<sup>6</sup>By Order of this Court filed July 24, 2007, we denied Father’s motion to dismiss Mother’s appeal based on her failure to file a transcript as required by Tenn. R. App. P. 24. The intent of the Tennessee Rules of Appellate Procedure is to allow cases to be resolved on their merits and this Court has wide discretion to waive or suspend the rules in furtherance of that intent. Tenn. R. App. P. 1; *Johnson v. Hardin*, 926 S.W.2d 236, 238 (Tenn. 1996). Mother subsequently filed a supplemental record and transcript of the December 1, 2006 hearing.

*v. Hugh M. Gray & Assocs., Inc.*, 1988 WL 123006, \*3 (Tenn. Ct. App. Nov. 18, 1988) (citing *Fey v. Nashville Gas & Heating Co.*, 64 S.W.2d 61, 63 (Tenn. Ct. App. 1933)). Thus, the court's refusal to hear proof or take any evidence outside the unsupported allegations contained in the petitions and the arguments of counsel necessarily means that it did not have the proper evidence before it.

In her brief, Mother "acknowledges that the trial court conducted its best-interest analysis by using standard custody and visitation proceedings." Father argues this statement should constitute a waiver to any objection Mother may have had to the proceedings in juvenile court. We disagree. We find that the court did not conduct a best-interest analysis in accordance with Tenn. Code Ann. § 36-6-106.

Accordingly, we remand the matter so the parties may present evidence concerning B.B.'s best interest. By vacating the trial court's amended parenting plan, we make no statement regarding its sufficiency as amended, for it may be a suitable and appropriate arrangement that is consistent with the child's best interest. We simply cannot ignore the fact that there was no evidence on which the court could properly base its parenting-plan decisions. For this reason, we find the trial court did not comply with Tenn. Code Ann. § 36-6-106 by summarily refusing to hear evidence bearing on the best interest of the child.

#### IV. CONCLUSION

Upon review of the record, we vacate the judgment of the trial court and remand this case to the trial court for further proceedings consistent with this opinion and in compliance with Tennessee Code Annotated Section 36-6-101. Costs of appeal are assessed equally against Appellant Tammy L. Brown and Appellee Bronson S. Burns, and each party shall be responsible for his/her own attorney's fees on appeal.

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ANDY D. BENNETT, JUDGE